**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **TERESA J. MATHENA** | ) | |
| Claimant | ) | |
| | ) | |
| VS. | ) | Docket No. 256,299 |
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| **IBP, INC.**[1] | ) | |
| Self-Insured Respondent | ) | |

## ORDER

Respondent requested review of the March 3, 2004 Award by Administrative Law Judge (ALJ) Brad E. Avery. The Appeals Board (Board) heard oral argument on June 2, 2004.

### APPEARANCES

Joseph Seiwert of Wichita, Kansas, appeared for the claimant. Gregory Worth of Roeland Park, Kansas, appeared for the self-insured respondent.

### RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

### ISSUES

Following a regular hearing, the ALJ awarded claimant a 7 percent functional impairment to the body as a whole for permanent injuries to her left shoulder and decreased grip strength in her right upper extremity. The ALJ also awarded claimant significant work disability benefits commencing June 10, 2002, the date she was terminated by respondent. The ALJ specifically denied any recovery for claimant's cubital tunnel syndrome, as it was diagnosed after the claimed date of accident. He also denied

[1] Effective 10/31/03 this respondent became known as Tyson Fresh Meats.

any recovery for claimant's right shoulder complaints as the ALJ concluded claimant failed to prove any additional impairment in her right shoulder as a result of her job activities.

The respondent requests review of this decision alleging the ALJ erred in awarding claimant benefits based upon a whole body injury. Respondent maintains the *Pruter*[2] decision limits claimant's recovery to 2 separate scheduled injuries as rated by Dr. Lynn D. Ketchum and forecloses any claim for work disability. Respondent also argues the average weekly wage was inappropriately calculated and failed to account for claimant's full-time work status. Finally, respondent maintains that if the Board ignores the principles set forth in *Pruter* and awards benefits based upon a whole body impairment, it is entitled to a minimum of a 5 percent credit against this award for payments made to claimant for her earlier right shoulder claim.

Claimant argues the ALJ appropriately found that she sustained an impairment to her body as a whole and is entitled to work disability benefits. However, claimant maintains the ALJ erred in failing to award compensation for her right elbow and shoulder complaints. According to claimant, her right shoulder complaints increased as a result of her work activities and her cubital tunnel condition was also caused by work and diagnosed just 11 days after she last worked for respondent. Thus, claimant maintains both conditions should be considered part of her compensable claim.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant began working for respondent in 1991. Her last regular job for respondent was that of trimming contamination off carcasses. This job required her to repetitiously sharpen a knife, use a hook, and twist and reach from the ground level to above her head for up to eight hours per day in cold temperatures.[3] Claimant processed approximately 4,000 carcasses per day.[4]

On October 7, 1999, claimant complained of pain in both her shoulders, elbows, hands, trigger finger and neck.[5] She was referred to Dr. Mike Estivo, who performed a

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[2] *Pruter v. Larned State Hospital*, 271 Kan. 865, 26 P.3d 666 (2001).

[3] R.H. Trans. at 9-11.

[4] *Id.* at 11.

[5] *Id.* at 11-12.

release of her right trigger finger and thumb. Respondent provided lighter work duty for a period of time and claimant's symptoms subsided.

Claimant was referred to Dr. Lynn D. Ketchum in May 2001, for an independent medical examination. During the course of this examination, claimant complained of ongoing bilateral upper extremity complaints and disclosed a prior right shoulder injury dating back to 1995. Following this examination, Dr. Ketchum diagnosed capsulodesis and probable impingement syndrome of the right shoulder with decreased motion, bilateral triceps tendinitis, de Quervain's syndrome of the right wrist, constrictive flexor tenosynovitis of the right thumb, subluxation of the CMC joint of the left thumb and constrictive flexor tenosynovitis of the left thumb. He assigned a 25 percent permanent impairment rating to the right upper extremity and a 15 percent to the left, for a combined rating of 23 percent permanent impairment to the body as a whole.[6]

Dr. Ketchum then apparently referred claimant to Dr. James N. Glenn, who diagnosed myofascial tendonitis in both shoulders with mild right distal radius thoracic outlet syndrome.[7] He went on to perform a de Quervain release on the right hand in July 2002. Dr. Glenn continued to see claimant until January 2003, when he provided her with restrictions on her general activities.

This was not the first time claimant had been treated by this physician. Dr. Glenn testified that he had treated claimant beginning in 1995 when she suffered a work-related right shoulder injury. Following a course of treatment for that injury, Dr. Glenn assigned a 3 percent impairment to right shoulder injury under the principles set forth in the 3rd edition of the A.M.A. *Guides.*[8] This claim was subsequently settled in 1997 for 25 percent impairment to the shoulder.

Dr. Glenn was asked whether claimant's shoulder was worse upon examination in 2003 compared to the last time he had seen it in 1997. He responded as follows:

> "Well, that's a bit of a shot in the dark as far as I'm concerned. I have to interpret what my notes say. I would say that probably not a lot worse than it was just a continuation of the same kind of misery she'd had with it."[9]

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[6] Ketchum Depo., Ex. 2 (May 8, 2001 report) at 2.

[7] Glenn Depo. at 36.

[8] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment,* (3rd ed.).

[9] Glenn Depo. at 20.

He eventually opined that her permanent impairment rating was "[p]robably close to the same, you know, probably still in the 3 to 5 percent range as far as mainly positional."[10]

During her course of treatment with Drs. Estivo and Glenn claimant's job duties continued to change and her restrictions were accommodated until June 10, 2002, the date she last worked for respondent. At that point, respondent could no longer accommodate her restrictions. On June 21, 2002, 11 days after she left work claimant was seen by Dr. Vito Carabetta who diagnosed moderately severe cubital tunnel syndrome on the right.

On June 30, 2003, claimant again saw Dr. Ketchum for a second independent medical examination. Following an examination and additional testing, he diagnosed moderately severe cubital tunnel and recommended claimant have a release on her right elbow. He further opined that this was "a work aggravate[d] condition".[11] Dr. Ketchum went on to assign a 30 percent permanent impairment rating to the right upper extremity and 6 percent to the left shoulder, for a combined rating of 21 percent permanent impairment to the body as a whole. This rating includes 20 percent impairment for the cubital tunnel syndrome of the right upper extremity, 5 percent for loss of grip strength and 5 percent for the capsule adhesions following the earlier right shoulder surgery. Dr. Ketchum testified that he was unable to say, with any degree of certainty, whether the right shoulder limitations and resulting permanency were as a result of surgery or aggravated by claimant's work activities since her surgery in 1995.[12]

On January 10, 2003, at her counsel's request, claimant was also examined by Dr. Pedro Murati. Following the examination, Dr. Murati diagnosed myofascial pain syndrome affecting the bilateral shoulders and cervical spine, bilateral medial and lateral epicondylitis and tendonitis, tenosynovitis of both hands with pain, crepitus and mild instability in both wrists.[13] He assigned a total of 28 percent permanent impairment to the whole body as a result of all of her physical complaints. This figure includes 5 percent impairment to the right shoulder.

Both Drs. Murati and Ketchum were asked to speak to the issue of task loss given claimant's physical limitation and the restrictions imposed by both. Dr. Ketchum reviewed a task list provided by Janice Hastert which outlined a total of 43 tasks performed by claimant over the past 15 years of her vocational life. According to Dr. Ketchum, claimant has lost the ability to perform 17 of the 42 tasks which translates to a 40 percent task loss. In contrast, Dr. Murati opined from a task list created by Doug Lindahl, a vocational expert,

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[10] *Id.* at 21.

[11] Ketchum Depo., Ex. 3 (June 30, 2003 report) at 2.

[12] *Id.* at 31-32.

[13] Murati Depo. Ex. 2 at 3-4 (Jan. 10, 2003 IME).

that claimant has lost the ability to perform 10 out 12 tasks, which translates to a 83 percent task loss.

Since leaving respondent's employ, claimant actively sought employment with IBP as well as with other potential employers. In fact, there is no suggestion that she was less than diligent in her job search once she left respondent's employ. Claimant eventually found employment, in August 2003, at a local restaurant. This job pays $6.00 per hour. Originally her hours at the restaurant were less than full-time. In the 6 week period leading up to the regular hearing claimant earned $1,388.00 which the ALJ calculated to be an average weekly wage of $231.33. The wage records show that shortly before the regular hearing her hours increased and in the two weeks preceding the regular hearing claimant had worked 40 hours per week plus an additional 10-12 hours of overtime.

Respondent contends this job was not part-time, but rather, was full-time as evidenced by the two weeks' pay before the regular hearing. The ALJ rejected this argument and the Board agrees with this finding. Claimant's hours may well have increased and could continue to remain at the full-time level beyond the date of her regular hearing. Nonetheless, given the totality of the circumstances, the ALJ's calculation of the wage based upon the part-time basis is reasonable. Working in excess of 40 hours for part of the 6 week period does not persuade the Board that claimant was employed on a full-time basis. If these hours continue, respondent is free to apply for review and modification to correct the average weekly wage calculation. The ALJ's finding as to claimant's $231.33 post-injury average weekly wage is affirmed.

The respondent's more significant issue on appeal is whether claimant's recovery is limited based the principles set forth in *Pruter*.[14] The Board must consider whether claimant sustained two separate scheduled injuries or a general bodily disability which would entitle her to enhanced recovery in the form of work disability.

In *Pruter*, the employee suffered simultaneous injuries to her right arm and right leg. The Kansas Supreme Court concluded K.S.A. 44-510c(a)(2) did not provide a legal basis for a general disability award and that the employee's benefits should have been calculated as two separate scheduled injuries under K.S.A. 44-510d.[15] In explaining its holding, the *Pruter* Court analyzed the relationship of the statutes governing an injured employee's recovery for a work-related injury. K.S.A. 44-510d provides the statutory schedule of compensation for certain permanent partial disabilities to specific body members. If an injury is not covered by the schedule set forth in K.S.A. 44-510d, then K.S.A. 44-510e covers compensation for nonscheduled or permanent partial general disabilities. The *Pruter* Court acknowledged that prior case law had awarded general bodily disability when

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[14] *Pruter v. Larned State Hospital*, 271 Kan. 865, 26 P.3d 666 (2001).

[15] *Id.* at 872, 26 P.3d 671.

parallel body members were involved.[16] Thus, the Court reiterated the following rule: only simultaneous injuries to parallel members allow for an award of permanent partial disability benefits. This rule has been extended to repetitive injury cases.[17]

Respondent offers *Pruter* for the proposition that absent *identical* parallel limb impairment, an injured employee's recovery is limited to that set forth under the schedule in K.S.A. 44-510d. Under this set of facts, claimant has a variety of physical complaints and impairments to both upper extremities, with evidence that at least some of her right shoulder complaints pre-dated the period covered by this claim. Respondent argues "claimant's left shoulder injury and decreased grip strength in her right hand are clearly not 'parallel limbs' for purposes of invoking K.S.A. 44-510c(a)(2) and permanent partial general disability."[18]

The Board has considered respondent's argument and believes it to be a far too narrow interpretation of the *Pruter* rationale. In this instance, the overwhelming evidence shows that claimant has suffered a bilateral upper extremity injury while working for respondent. Although *Pruter* speaks of parallel limbs, that does not, in the Board's view, necessarily mean identical parallel limbs or joints or resulting symmetrical injuries. The application of the statutory schedule to each individual employee's injury is to be done on a case-by-case basis. In the instant case, the Board finds that the claimant has sustained a general bodily disability as a result of her work-related injuries which, for purposes of calculation, is October 7, 1999, the stipulated date of accident.

Although the ALJ did not specifically address the respondent's argument with respect to *Pruter*, the ALJ did award a 7 percent permanent partial impairment to the body as a whole for an undisputed injury to claimant's left shoulder and the decreased grip strength in her right upper extremity.[19] He made this finding, in part, based on the opinion of Dr. Ketchum, the court-appointed independent medical examiner. However, the ALJ excluded that portion of Dr. Ketchum's opinions that assigned impairment for the cubital tunnel syndrome. The ALJ found that "[t]he development of the cubital tunnel syndrome . . .most likely occurred after the stipulated date of accident and therefore is not part of this claim."[20] The Board disagrees with this finding.

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[16] See *Honn v. Elliott*, 132 Kan. 454, 295 Pac. 719 (1931) and *Downes v. IBP, Inc.*, 10 Kan. App.2d 39, 691 P.2d 42 (1984), *rev. denied* 236 Kan. 875 (1985).

[17] *Downes v. IBP, Inc.*, 10 Kan. App.2d 39, 691 P.2d 42 (1984), *rev. denied* 236 Kan. 875 (1985).

[18] Respondent's Brief at 6 (filed Apr. 27, 2004).

[19] ALJ Award (Mar. 3, 2004) at 4.

[20] *Id.*

The fact that Dr. Ketchum's diagnosis as well as that made by Dr. Carabetta came after claimant left respondent's employ and after the stipulated date of accident does not, in the Board's view, necessarily preclude her recovery for that condition. The Kansas Supreme Court has recognized that in repetitive injury cases a compensable injury can occur even before the resulting condition has manifested itself.[21] Here, claimant's work was very repetitive, requiring the use of both her upper extremities and continued until the day she left work. Although a series of accidents and repetitive use injuries were pled, the parties agreed to an accident date of October 7, 1999 for computation purposes. The claimant continued to work for respondent until June 10, 2002. She was accommodated during that time but she, nevertheless, continued to use her upper extremities on a daily basis and required treatment for her ongoing upper extremity complaints, particularly tingling in her ring and little finger on the right as well as night time numbness. On June 21, 2002, just 11 days after she left respondent's employ, she was diagnosed with moderately severe cubital tunnel in the right arm. Dr. Ketchum made the cubital tunnel diagnosis, confirmed it with a nerve conduction study and specifically stated "[t]his is a work aggravated condition."[22]

For these reasons, the Board finds the ALJ erred in not including the cubital tunnel condition in the claimant's final percentage of impairment. Therefore the Board modifies the ALJ's functional impairment finding to 25 percent to the right upper extremity, thus reflecting the additional permanency for the cubital tunnel condition. When converted, this yields a 15 percent to the body as a whole and when combined with Dr. Ketchum's 6 percent to the left upper extremity, the resulting impairment is 19 percent to the body as a whole.

As for respondent's contention that it is entitled to a credit of 5 percent for a pre-existing impairment to claimant's right shoulder, the Board finds that respondent has failed to meet its burden on this issue. Dr. Glenn testified that there was a 3-5 percent pre-existing impairment but he was unable to indicate whether that assessment was based upon the now-applicable 4th edition of the *Guides*. Similarly, Dr. Ketchum was equally unable to apportion the impairment to a reasonable degree of certainty. The best he could say was that claimant presently had a 5 percent impairment to her shoulder but whether that represented an increase in her impairment or was attributable to her earlier injury was unknown. Thus, respondent is not entitled to any credit for preexisting impairment.

Turning now to respondent's argument against the ALJ's award of work disability, the Board also finds that the ALJ's analysis with regard to claimant's wage loss and utilization of the $231.33 post-injury average weekly wage is appropriate and should be affirmed. Claimant made a good-faith effort, consistent with the principles set forth in

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[21] See *Depew v. NCR Engineering & Manufacturing*, 263 Kan. 15, 947 P.2d 1 (1997).

[22] Ketchum Depo., Ex. 3 (6/30/03 Report).

*Foulk*[23] and *Copeland*[24] to locate employment after leaving her job with respondent. Thus, her actual wages are to be used in calculating her work disability under K.S.A. 44-510e(a). Likewise, the ALJ's decision to calculate that wage based upon actual wages earned within the 6 week period before the Regular Hearing was consistent with the principles set forth in K.S.A. 44-511. Should claimant's employment continue on a full-time basis, respondent is free to file a request for review and modification under K.S.A. 44-528.

The Board must also consider the task loss component of claimant's work disability award. The ALJ concluded claimant sustained a 52.50 percent task loss and indicated that he gave equal credence to both doctors' assessments. The Board finds that rationale to be reasonable, but finds that when the two opinions are averaged, the result is 61.5 percent.

When the 61.5 percent task loss is averaged with the 47 percent wage loss (with benefits paid by employer), the result is a 54.25 percent work disability from June 11, 2002 to June 10, 2003. Commencing June 11, 2003, the 61.5 percent task loss averaged with a 53 percent wage loss (when benefits were discontinued), results in a 57.25 percent work disability. The ALJ's Award is modified to reflect these findings.

All other findings in the Award are hereby affirmed to the extent they are not inconsistent with the Board's findings herein.

## AWARD

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated March 3, 2004, is affirmed in part and modified in part.

The claimant is entitled to 43.29 weeks of temporary total disability compensation at the rate of $289.14 per week or $12,516.87 followed by 73.47 weeks of permanent partial disability compensation at the rate of $289.14 per week or $21,243.12 for a 19% functional disability followed by 52.14 weeks of permanent partial disability compensation at the rate of $289.14 per week or $15,075.76 for a 54.25% work disability followed by 95.78 weeks of permanent partial disability compensation at the rate of $289.14 per week or $27,693.83 for a 57.25% work disability, making a total award of $76,529.58.

As of July 02, 2004 there would be due and owing to the claimant 43.29 weeks of temporary total disability compensation at the rate of $289.14 per week in the sum of

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[23] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[24] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

$12,516.87 plus 181.04 weeks of permanent partial disability compensation at the rate of $289.14 per week in the sum of $52,345.91 for a total due and owing of $64,862.78, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $11,666.80 shall be paid at the rate of $289.14 per week for 40.35 weeks or until further order of the Director.

**IT IS SO ORDERED.**

Dated this _____ day of July 2004.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant
Gregory Worth, Attorney for Self-Insured Respondent
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director